UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil No.: 99-516-CIV-J-20A
v.	)	
FLORIDA ROCK INDUSTRIES, INC.; HARPER BROS., INC.; COMMERCIAL TESTING, INC.; and DANIEL R. HARPER,	)	Filed: 5/26/99
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25, on May 26, 1999, alleging that the proposed acquisition by Florida Rock Industries, Inc. (“Florida Rock”) of Harper Bros., Inc. (“Harper Bros.”) and Commercial Testing, Inc. (“Testing”) pursuant to a letter of intent entered into on May 5, 1999, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18.

The Complaint alleges that a combination of two of only three significant competitors in the aggregate and silica sand markets in Charlotte, Lee, and Collier Counties and Sarasota County south of State Route 780 in Florida ("Southwest Florida") would lessen competition in the production and sale of aggregate and silica sand in Southwest Florida. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing Florida Rock from acquiring control of Harper Bros., Testing, and 320 acres of land, or otherwise combining with the businesses of Harper Bros. and Testing; (3) the United States be awarded costs; and (4) other relief as the Court deems just and proper.

When the Complaint was filed, the United States, also filed a proposed settlement that would permit Florida Rock to complete its acquisition of Harper Bros., Testing, and 320 acres of land, but require a certain divestiture that will preserve competition in the Southwest Florida aggregate and silica sand markets. This settlement consists of a Stipulation and Order, a proposed Final Judgment and a Hold Separate Stipulation and Order.

The proposed Final Judgment orders Florida Rock to divest the Florida Rock Alico Road Quarry located in Lee County, Florida, the Harper Bros. Palmdale Sand Mine located in Glades County, Florida, and certain related tangible and intangible assets associated with the facilities. Florida Rock must complete the divestiture of this quarry and related assets within one hundred and eighty (180) calendar days after the date on which the proposed Final Judgment was filed (i.e., May 26, 1999) or within 5 days after notice of the entry of the Final Judgment by the Court, whichever is later, in accordance with the procedure specified therein. If Florida Rock does not do so within the time frame in the proposed Final Judgment, a trustee appointed by the Court

would be enpowered for an additional six months to sell the assets. If a trustee must undertake to divest the Alico Road Quarry, the trustee has the option of adding certain Florida Rock aggregate reserve parcels that are contiguous to the Alico Road Quarry to the divestiture package.

The Stipulation and Order, proposed Final Judgment and Hold Separate Stipulation and Order require Florida Rock to ensure that the Alico Road Quarry, the Palmdale Sand Mine, and related assets to be divested will be maintained and operated as an independent, ongoing, economically viable and active competitor until the divestitures mandated by the proposed Final Judgment have been accomplished. Florida Rock must preserve and maintain the quarry and sand mine to be divested as saleable and economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of Florida Rock's other aggregate and silica sand businesses. Florida Rock will appoint a person to monitor and ensure its compliance with these requirements of the proposed Final Judgment.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Florida Rock, Harper Bros., Testing, and the Proposed Transaction

Florida Rock is a Florida corporation with headquarters in Jacksonville, Florida. Florida Rock operates in Florida, Georgia, Virginia, Maryland, Washington, D.C., and North Carolina. One of its principal businesses is extracting and selling aggregate and silica sand. Florida Rock is

engaged in the business of selling aggregate and silica sand in Southwest Florida. In Lee County, Florida Rock operates the Alico Road Quarry that produces aggregate, and in Glades County, it operates the Witherspoon Sand Mine which produces silica sand. In 1997, Florida Rock had sales of approximately $456 million.

Harper Bros is a Florida corporation with headquarters in Fort Myers, Florida. One of Harper Bros.' principal businesses is extracting and processing aggregates and silica sand. Harper Bros. is engaged in the business of selling aggregate and silica sand in Southwest Florida. In Lee County, Harper Bros. operates the Alico Road Mine that produces aggregate, and in Glades County, it operates the Palmdale Sand Mine which produces silica sand. In 1997, Harper Bros. had sales of approximately $44 million.

On July 21, 1998, through a letter of intent that was supplemented on August 26, 1998, Florida Rock agreed to acquire all of the outstanding capital stock of Harper Bros., Testing and 320 acres of land. The letter of intent lapsed on January 2, 1999, and a subsequent letter of intent was entered into by the defendants on May 5, 1999. The purchase price is approximately $87.5 million. This transaction, which would take place in the highly concentrated Southwest Florida aggregate and silica sand industries, precipitated the government's suit.

B. The Transaction's Effects in Southwest Florida

The Complaint alleges that, the production and sale of aggregate and silica sand constitute two distinct lines of commerce, or relevant product markets, for antitrust purposes, and that Southwest Florida constitutes a section of the country, or relevant geographic market. The complaint alleges that the effect of Florida Rock's acquisition may be to lessen competition substantially in the production and sale of aggregate and silica sand in Southwest Florida.

Aggregate is a stone product used to manufacture asphalt concrete and ready mix concrete. Aggregate differs from all other types of stone products in its physical composition, functional characteristics, customary uses, and pricing. It must meet Florida Department of Transportation or American Society of Testing Material's specifications for the specific type of asphalt concrete or ready mix concrete being produced. Manufacturers of asphalt concrete and ready mix concrete in Southwest Florida do not view other types of stone products as good substitutes. The production and sale of aggregate used to manufacture asphalt concrete and ready mix concrete constitutes a line of commerce and a relevant market for antitrust purposes.

Silica sand differs from sand that is manufactured from stone products (manufactured sand is the alternative to silica sand) in its physical composition, functional characteristics, and customary uses. The Florida Department of Transportation requires silica sand to be used in ready mix concrete whenever the ready mix concrete is used as a surface for vehicular traffic. Commercial contractors use silica sand in place of, or in combination with, manufactured sand to manufacture ready mix concrete when superior pumping or finishing qualities are required. Manufacturers of ready mix concrete recognize silica sand as a distinct product. The production and sale of silica sand used to manufacture specific types of ready mix concrete constitutes a line of commerce and a relevant market for antitrust purposes.

Producers of aggregate and/or silica sand located in or near Southwest Florida sell and compete with each other for sales of aggregate and silica sand in Southwest Florida. Due to high transportation costs and long delivery time, producers of aggregate and/or silica sand not located in or near Southwest Florida do not sell a significant amount of aggregate and/or silica sand for use within Southwest Florida.

The Complaint alleges that Florida Rock's acquisition of Harper Bros. would substantially lessen competition for the production and sale of aggregate and silica sand in Southwest Florida. Actual and potential competition between Florida Rock and Harper Bros. for the production and sale of aggregate and silica sand in Southwest Florida will be eliminated. Florida Rock and Harper Bros. are the largest producers of aggregate in Southwest Florida and have the largest reserves of aggregate in Southwest Florida. Florida Rock accounts for about 44 percent of the aggregate produced in Southwest Florida and Harper Bros accounts for approximately 24 percent. After the acquisition, the combined entity will control about 68 percent of the Southwest Florida aggregate market. They are two of only three significant producers in Southwest Florida possessing sufficient aggregate reserves that would permit consumers to switch aggregate suppliers if prices increased.

For silica sand, Florida Rock and Harper Bros. are two of only three producers capable of selling silica sand in the Southwest Florida. After the acquisition, the combined entity will control approximately 60 percent of the Southwest Florida silica sand market.

The acquisition of Harper Bros. by Florida Rock would create a dominant aggregate and silica sand company in Southwest Florida. In the aggregate market, it would reduce from three to two the number of significant competitors which possess sufficient aggregate reserves that would permit consumers to switch aggregate suppliers if prices were increased. In the silica sand market, the number of competitors would decline from three to two. Florida Rock would have the market power to increase prices for aggregate and silica sand. In addition, the proposed acquisition will facilitate coordinated pricing activity among aggregate and silica sand producers and increase the likelihood of anticompetitive price increases for consumers. Aggregate and silica

sand products are only slightly differentiated (if at all), and price is an important dimension of competition. The combination of Florida Rock's and Harper Bros.' Southwest Florida aggregate and silica sand businesses would result in a substantial reduction in competition, increase the risk of coordinated action, and likely result in higher aggregate and silica sand prices.

New entry in Southwest Florida is unlikely to restore the competition lost through Florida Rock's removal of Harper Bros. from the aggregate and silica sand markets. Establishing a new, successful aggregate or silica sand production facility in or near Southwest Florida is difficult, time-consuming and costly. To be cost competitive in Southwest Florida, an aggregate or silica sand production facility must be able to produce large amounts of consistent quality aggregate or silica sand in close proximity to asphalt concrete and/or ready mix concrete plants. Environmental and zoning permits must be obtained to operate an aggregate or silica sand production facility. Federal, state and local environmental provisions and state and local zoning provisions make it very difficult to open an aggregate or silica sand production facility in or near Southwest Florida. Timely and sufficient entry is unlikely to occur in the aggregate or silica sand markets in Southwest Florida to defeat any post-acquisition price increases.

C. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: competition for the production and sale of aggregate and silica sand in Southwest Florida will be substantially lessened; actual and potential competition between Florida Rock and Harper Bros. in the production and sale of aggregate and silica sand in Southwest Florida will be eliminated; and prices for aggregate and silica sand in Southwest Florida are likely to increase above competitive levels.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the production and sale of aggregate and silica sand in Southwest Florida by placing in independent hands Florida Rock's Alico Rod Quarry which serves the Southwest Florida aggregate market and Harper Bros.' Palmdale Sand Mine which serves the Southwest Florida silica sand market. This would maintain the existing number of suppliers in the two markets. In response to a price increase from Florida Rock, purchasers would be able to turn to other producers of aggregate and silica sand with significant capacity to serve Southwest Florida.

Within one hundred and eighty (180) calendar days after filing the proposed Final Judgment or five (5) days after the entry of the Final Judgment, whichever is later, Florida Rock must divest its Alico Road aggregate quarry, Harper Bros.' Palmdale Sand Mine, and related assets. The Alico Road Quarry and the Palmdale Sand Mine will be sold to a purchaser or purchasers that demonstrates to the sole satisfaction of the United States that they will be an economically viable and effective competitors, capable of competing effectively in the production and sale of aggregate and/or silica sand in Southwest Florida.

Until the ordered divestiture takes place, Florida Rock must take all reasonable steps necessary to accomplish the divestiture and cooperate with any prospective purchaser. If Florida Rock does not accomplish the ordered divestiture within the specified one hundred and eighty (180) calendar days, which may be extended by up to sixty (60) calendar days by the United States in its sole discretion, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestiture. If a trustee must undertake to divest the

Alico Road Quarry, the trustee has the option of adding certain Florida Rock aggregate reserve parcels that are contiguous to the Alico Road Quarry to the divestiture package. Florida Rock must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that Florida Rock will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price then available for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the mandated divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth the trustee's efforts to accomplish the divestiture, explain why the divestiture has not been accomplished, and make any recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable

attorney's fees. Entry of the proposed Final Judgment neither will impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Florida Rock, Harper Bros., Testing, or Daniel Harper.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person should comment within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section

Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against the defendants. The United States is satisfied, however, that the divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the production and sale of aggregate and silica sand in Southwest Florida that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). The courts have recognized that the term " 'public interest' take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," Northern Pacific Railway Co. V. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir.1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of

prompt and less costly settlement through the consent decree process."[1] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a Court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). See also, Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

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[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D.Mass.1975) A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See, H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[2] United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Final Judgment therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[3]

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

United States v. American Cyanamid Co., 719 F.2d at 565.

[5] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

Respectfully submitted,

Executed on: May 25, 1999

_____/s/ _____

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